

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Advanced Methods to Target and Eliminate  
Unlawful Robocalls

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CG Docket No. 17-59

**COMMENTS OF THE NATIONAL RETAIL FEDERATION**

The National Retail Federation (NRF) is the world's largest retail trade association. Based in Washington, D.C., NRF represents discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and internet retailers from the United States and more than 45 countries. Retail is the nation's largest private-sector employer, supporting one in four U.S. jobs – 42 million working Americans. Contributing \$2.6 trillion to annual GDP, retail is a daily barometer for the nation's economy.

NRF appreciates the opportunity to submit these views to the Federal Communications Commission (FCC) in response to its Second Further Notice of Proposed Rulemaking (NPRM), released March 22, 2018, regarding a proposed rule to require reporting of information about reassigned telephone numbers to a database accessible to callers, which would facilitate callers' compliance with the Telephone Consumer Protection Act (TCPA).<sup>1</sup> Please be advised that the comments herein provide our views on several questions raised in the NPRM, and the absence of any responses or comments on other questions not addressed herein should not be construed by the Commission or other parties as support for, or opposition to, the Commission's position.

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<sup>1</sup>FCC Second Further Notice of Proposed Rulemaking, *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (Rel. March 23, 2018) (hereinafter, "NPRM").

#### **A. Retailers Believe an FCC Solution to the Reassigned Number Problem is Necessary**

Over the twenty-five years since the enactment of the TCPA, elements of the statute, and the regulations that have flowed from it, have been outpaced by technological advances in communications that have both enhanced and expanded the methods by which businesses may communicate in a responsible way with their existing customers. Because the TCPA has the potential to impact a broad array of business-customer communications, the FCC has properly recognized the need to interpret the statute in a manner that permits businesses to engage their customers in a seamless way that is not unnecessarily cumbersome for either consumers or the businesses with which they interact.

Retailers want to do right by consumers and make their periodic interactions with them as pleasant as possible so they can build up trusted business-customer relationships over time. Customer service is of paramount importance in an extremely competitive industry where store owners have long recognized that customers have many choices and will, especially if displeased with one store's service, choose to shop at another store that is nearby or simply a mouse-click away. With these factors in mind, many retailers strive to deliver only those communications that their customers want or reasonably expect to receive, and to make this experience as seamless as possible and not needlessly complicated. Communicating with customers as they prefer is good for consumers and good for business.

The Commission has strived to balance the interests of consumers and businesses while ensuring the TCPA does not needlessly burden the reasonable expectations of the parties. Despite these efforts, there remain known areas of litigation where the FCC should consider clarifying the rules to address potential overreach and demonstrated abuses. It is for this reason that retailers welcome the Commission's notice of proposed rulemaking regarding reassigned

numbers. Retailers continue to face excessive litigation over communications errors resulting from a wireless carrier's unknown *reassignment* of a customer-provided mobile number to a *new* customer who then receives a call or text message at the same number which the store had prior consent to contact. Given the lack of a centralized database of phone number reassignments, businesses find it difficult to determine if a number for which they have received prior consent to contact has been reassigned to another individual or if a consumer has ported her landline number to a mobile phone.

We appreciate the Commission initiating a proceeding to address what it called in the Notice of Inquiry (NOI) released last year a “significant and longstanding” problem of automated calls (including text messages) to phone numbers of “consumers who had consented to receive calls but whose phone numbers have subsequently been reassigned to a new consumer.”<sup>2</sup> We agree with the Commission that “the recipient of the reassigned number is subject to unwanted calls” and “conversely, the previous holder of the reassigned number is no longer receiving those calls for which she gave consent.”<sup>3</sup>

This problem has grown worse over the years as wireless telephone providers recycle mobile telephone numbers by reassigning them to new subscribers after consumers switch wireless providers (without porting their previous wireless numbers to the new carrier) or get new wireline telephone numbers when they move. The reassigned number problem is one of significant scope and complexity, and it is only growing more complicated each year. As the NOI stated, “approximately 35 million telephone numbers are disconnected each year...[and] 100,000 numbers are reassigned by wireless carriers every day.”<sup>4</sup> This problem needs to be

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<sup>2</sup> FCC Second Notice of Inquiry, *In the Matter of Advanced Methods to Target and Eliminate Unlawful Robocalls*, CG Docket No. 17-59 (Rel. July 13, 2017) (hereinafter, “NOI”).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

addressed as soon as possible.

We agree with the Commission that there is significant support among consumer groups and businesses making automated calls and text messages for a solution to this problem through the establishment of a comprehensive and up-to-date repository of reassigned number information by which callers can verify whether a number has been reassigned prior to initiating a call. We strongly support the FCC's conclusion that "[m]aking a reassigned numbers database available to callers that want it will benefit consumers by reducing unwanted calls intended for another consumer while helping callers avoid the costs of calling the wrong consumer, including potential violations of the Telephone Consumer Protection Act."<sup>5</sup>

Although there are existing tools to help callers identify reassigned numbers, we appreciate that the Commission has previously recognized in the NOI that "callers lack guaranteed methods to discover all reassignments immediately after they occur," which still remains the case today.<sup>6</sup> Furthermore, despite the recent D.C. Circuit decision on reassigned numbers in *ACA International*,<sup>7</sup> retailers believe it remains absolutely necessary to establish a technically sound and effective industry solution to this solvable problem of avoiding unwanted calls and text messages to reassigned mobile numbers that benefits consumers and businesses alike. We therefore appreciate this opportunity to once more provide our comments to the Commission on what we believe are the most efficient ways to require all voice service providers (VSPs) to report information about reassigned numbers, and the most effective means for making that information available to businesses so that they may continue to reach consumers who wish to receive their calls and avoid calling consumers with new phones who do not want them.

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<sup>5</sup> See NPRM, at par. 2.

<sup>6</sup> See NOI.

<sup>7</sup> *ACA International v. FCC*, No. 15-1211, slip opinion (D.C. Circ. Mar. 16, 2018).

## **B. Comments Addressing Questions Raised by Commission in the NPRM**

One of the telecommunications issues of broadest concern to our members over the years has been compliance with the TCPA, which regulates a company's communications with its customers via phone calls and text messages. Many retailers have faced class action litigation over standard communications practices based on plaintiff attorneys' ever-expanding interpretations of this 1991 law that was originally intended to curb unsolicited telemarketing calls. Over the years, NRF has regularly engaged federal courts with amicus briefs and federal regulators with comments to advocate the retail industry's position on a range of TCPA matters.

NRF believes we can provide the most valuable and useful comments to the Commission by limiting them to specific questions in the NPRM that raise the most important policy questions for our members. Therefore, rather than respond to all of the Commission's questions, we have provided responses to seven categories of questions where our members have indicated they are of the highest priority and where we have developed a unified position on the topic. In the specific responses below, we have developed our position on each these key issues with information we have received directly from our members based on their experience complying with the TCPA over the many years since its enactment.

### **1. Reporting Mechanism: The Retail Industry Supports an FCC-Established Centralized Database for Reassigned Telephone Number Information**

As noted in our previous comments to the Commission on TCPA matters, our retail members have long called for and supported the development of a comprehensive and TCPA-compliant solution to the telephone number reassignment problem. Our two sets of comments to the Commission in 2017 indicated our industry's desire to have a centralized database of reassigned number information that businesses could query in an automated fashion. With respect to litigation over reassigned phone numbers to date, we commented as follows:

“Despite the Commission’s balanced track record to date on TCPA matters such as these, there remain known areas of litigation where the FCC should consider clarifying the rules to address potential overreach and demonstrated abuses. For example, retailers continue to face excessive litigation over communications errors resulting from a wireless carrier’s unknown reassignment of a customer-provided mobile number to a new customer who then receives a call or text message at the same number which the store had prior consent to contact. Given the lack of a centralized database of phone number reassignments, businesses find it difficult to determine if a number for which they have received prior consent to contact has been reassigned to another individual or if a consumer has ported her landline number to a mobile phone.”<sup>8</sup>

As the nation’s largest private-sector employer and an industry that has served American consumers for hundreds of years, the retail industry strongly supports the FCC’s first of three proposed reporting mechanisms – specifically, an FCC-established centralized database for reassigned telephone number information.

While the NPRM poses a range of questions on the reporting mechanism (many of which are technical in nature), we view the heart of the Commission’s inquiry as seeking input on three alternative methods by which VSPs might be required to report reassigned number information that business callers could access before making calls or sending text messages to mobile numbers. After soliciting input from our members on this question, it was remarkable that *every* response we received strongly supported only the first of the Commission’s proposed options – a single and centralized database of reassigned number information established by the FCC that may be accessed in an automated way by all entities placing calls or sending texts to telephone numbers.

Our members unequivocally listed the FCC’s first alternative – mandatory reporting to a single database – as the best alternative, and many indicated it was the *only* alternative that could be implemented to achieve the Commission’s goal of providing an effective solution to this persistent problem. In our view, each of the other proposed alternatives is flawed in important

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<sup>8</sup> See Comments of the National Retail Federation, CG Docket Nos. 02-278, 05-338, at 8 (March 10, 2017).

respects that makes them inferior to a centralized, FCC-established database of reassigned number information. The comments below provide further detail on why our members have reached this conclusion.

First, a centralized database provides a singular “source of truth” as to whether a number has been reassigned. The source of the data would be known by the business accessing the database, and having a single database would simplify the process of validating whether a number has been reassigned. From a practical standpoint, it may not matter if this centralized database is actively managed by the FCC or by another entity, provided that there is only a *single* source that callers can check to see if phone numbers have been reassigned to other subscribers.

The two other reporting alternatives proposed by the FCC do not provide these benefits and are ultimately incapable of achieving the Commission’s desired ends. For instance, the second alternative would require each VSP to report information directly to a third-party commercial aggregator of reassigned number information. For any company, let alone small businesses, this problem would be extremely difficult and costly to manage, especially with no single source of the information and several points of input and output in this proposed decentralized process. As contemplated by the Commission’s second and third proposed alternatives, the logistics of businesses dealing with multiple service providers who might provide differing data sets in various formats would be costly and challenging for callers and service providers alike. Furthermore, the third alternative, which proposes voluntary reporting to commercial aggregators, would not provide a comprehensive or effective solution that helps consumers or businesses. It is, in short, a non-solution.

The NPRM also asks whether exceptions from the reporting obligations should be made for rural or small business VSPs. The Commission should recognize that small business callers

would not be exempt from TCPA violations involving errant calls to reassigned mobile numbers, Likewise, rural or small business VSPs should not be relieved from obligations to report reassigned numbers. These entities' failure to report mobile number reassignments – either because the Commission exempts them from reporting or establishes only a voluntary reporting rule – means that consumers using those VSPs and receiving reassigned numbers are also likely to receive unwanted calls or text messages because callers will remain woefully unaware that numbers for which they have consent to contact have been reassigned. Once again, this is a non-solution to the problem.

Lastly, both the second and third alternatives would ultimately require each caller to know (or somehow determine) the identity of each VSP for its customers' numbers in order to contract with each aggregator that receives those service providers' reassigned number information. In our view, these may be alternatives, but they are not alternative *solutions* to the well-known problem of eliminating unwanted calls and texts to reassigned mobile numbers.

Our members have made it clear to us, and NRF wishes the Commission to know, that among all issues on which we are commenting, this first one – promoting the development of an FCC-established centralized database of reassigned number information – is our highest priority. A principal concern with reassigned numbers is text-messaging to an individual with a mobile phone number that had previously provided the requisite level of consent but has ended her service with a VSP that in turn has reassigned the number. An easily and electronically centralized method of checking to see if mobile phone numbers have been reassigned would resolve this issue. There is less chance for error when businesses only need to scrub their customer contact lists against one, centralized and validated source for updated information on reassigned numbers. The responsibility for providing the data in that database lies with the VSPs



that actually have it, and the corresponding responsibility of business callers would be to check and use the updated database information to ensure compliance with the TCPA by avoiding the errors of calling or texting reassigned numbers.

As further discussed below, another significant benefit of a centralized database over the other proposed alternatives is that it would facilitate the establishment of a safe harbor for entities accessing this single source of validated reassigned number information.

## **2. Safe Harbor: TCPA Should Include Safe Harbor for a Specified Period of Time for Callers Checking Reassigned Number Information in Advance of Calls/Texts**

Our members strongly support the FCC establishing a “safe harbor” from TCPA violations for callers who use or access reassigned number information provided under one of the alternative mechanisms adopted by the FCC. Ideally, the safe harbor should extend for some specified period that exceeds the minimum period for required service providers to report reassigned numbers. This would ensure that TCPA violations resulting from service provider reporting delays are not borne by callers who would have had no guaranteed method to verify that a number it called erroneously had been reassigned during the lag time between the time of number reassignment by a VSP and the VSP’s delayed reporting of that reassignment.

Additionally, a safe harbor should be provided for any caller who uses the reassigned number resource, regardless of which one is ultimately adopted by the FCC. The safe harbor should be available to any caller who can show that it regularly accesses the applicable resource and has a procedure in place to apply the information in the resource to its autodialer use. A safe harbor provides an incentive for callers to spend the money and apply its own resources to develop procedures for accessing and utilizing the reassigned number information, resulting in fewer “wrong number” calls to consumers and fewer TCPA lawsuits for callers who are caught unaware of a number reassignment.

One reason retailers feel strongly about establishment of a safe harbor is because of their experience with the liability exposure created by a service provider that fails to report its reassigned numbers in a timely or accurate manner. Businesses attempting to reach their customers should not be penalized because there is a lag time between a customer's number reassignment by a VSP and the reporting of the same information to that business or the public. If real-time updates are not possible or required, then clearly there needs to be some sort of safe harbor to protect callers from potential liability resulting from the service provider's failure to timely report a reassigned number. This issue would be even more complicated in a voluntary reporting regime where, despite the best efforts of callers to determine if numbers have been reassigned, VSPs choose to never supply any information to a database about the numbers they reassign.

Additionally, business callers need some form of protection if the centralized database is not accurate at the time it was checked. In these cases of untimely or inaccurate reassigned number information (or where a voluntary reporting requirement or one with exemptions means the database is *de facto* not comprehensive), principles of equity demand that the FCC establish a system that properly places blame for errors where they belong (on VSPs not reporting reassigned numbers). A single, centralized database of reassigned number information coupled with mandatory reporting requirement for all VSPs and an appropriately crafted safe harbor would create the proper incentives for business callers to access and use the established reporting mechanism without fear of litigation for circumstances outside of their control.

The FCC should also take into consideration the response time of queries and the ability for businesses large or small to process large amounts of data from a reassigned number database quickly and accurately. Reputable companies seek to follow the law and mitigate risk,

but functionality and the ability to quickly disseminate the needed information is key. As noted in our comments on reporting frequency below, real-time or daily reporting of reassigned number information would be ideal. Equally important, however, is for the FCC to provide clear guidance on how much time is reasonable for a business to retrieve the updated information from a central database and input it into their own database to avoid contacting reassigned numbers. During this period, a safe harbor would protect businesses from abusive litigation based on failures to access a database and update a calling system in an unreasonably short amount of time.

With respect to the time period businesses may rely on a safe harbor during the process of checking a centralized database of reassigned number information, it makes sense to adopt a time period that in some way corresponds to the frequency with which databases must be updated by service providers, and then extend it beyond that time by the reasonable amount of time businesses would have to update their own systems. For example, the safe harbor could protect an entity from liability for calling a party without consent if the calling entity can demonstrate that it checked a centralized database within 30 days of when the call was made and that it had consent to call a phone number at the time the call was made. For small businesses, a reasonable time limit to check a centralized database might be quarterly, whereas for larger entities with more significant operations and resources, it may be capable of checking it within 30 days of the date of updating provided the VSPs update the database in real-time or at least on a daily basis. We note that the TCPA provides up to 30 days to process an opt-out request, and permits a 15-day grace period to identify ported numbers. These time periods provide some comparable precedent for setting a reasonable safe harbor time frame.

However, if the FCC adopts one of the other three alternative reporting mechanisms, each

of which may require callers to access information from multiple service provider databases or scour all publicly reported information, the amount of time under the safe harbor would need to be quite extensive to provide adequate protection given the burden that would be placed on calling entities to check many sources and upload information on a periodic basis. It may not even be practically achievable for most businesses, and particularly not for small businesses, to access and move data from multiple sources to their own database in a rapid fashion. It would be challenging for most callers to manage any process involving multiple sources of information without expending significant amounts of time, resources and capital. For these reasons, a safe harbor extending for a lengthy period of time would be necessary to accompany the second, third and fourth alternative reporting mechanisms proposed by the Commission. With a centralized database, though, the length of the safe harbor period could be correspondingly measured, particularly if the database is required to be updated in real-time or at least on a daily basis.

**3. Frequency of Updates: Reassigned Number Information Should Be Updated in Real-Time or At Least on a Daily Basis**

Many retailers believe an FCC-established database of reassigned number information should be updated and maintained in real-time, or at least on a daily basis. Daily batch downloads may be sufficient as they allow a day's porting (i.e., disconnect on carrier A and activation on carrier B) to net out. If technically feasible, however, the reporting in a centralized database should be provided in an automated, real-time manner by the service providers that are reassigning the numbers. If real-time updates are not possible or required by the FCC, then the Commission (as noted above) clearly needs to extend any safe harbor to cover not only the length of reporting time (e.g., a month, each quarter) but also the *additional* amount of time the FCC deems reasonable for calling entities to periodically check and access the database to update their own calling system with the updated number information. Businesses should not be

penalized because there is a lag time between number reassignment and reporting of the same reassigned number information to a centralized database (or through any other alternative mechanism adopted by the FCC).

**4. Tracking Access: Tracking Access to Reassigned Number Information Will Deter Bad Actors and Provide Validation for Callers Entitled to a Safe Harbor**

In order to deter bad actors and to determine whether any reassigned number information resource was a potential source of misused phone numbers, those who access a centralized database should be required to register and to certify the purpose for which the database is being accessed (not unlike the permissible purpose certifications associated with access to credit reporting information under the Fair Credit Reporting Act).

Tracking access would be most feasible with an FCC-established centralized database of reassigned number information. It would be more difficult to establish tracking mechanisms for alternatives that imagine multiple databases that are operated by private entities. Without this tracking, the benefits derived from tracking (i.e., deterrence of bad actors, etc.) would be lost.

A very important, additional benefit of tracking access to an FCC-established centralized database is that it provides a simplified mechanism to validate that a calling entity accessed the database prior to making a call or sending a text to a reassigned number. In this way, it would provide “proof of use” for reliance on a safe harbor provision established by the Commission.

**5. Access Fees for Reassigned Number Data: The FCC Should Prohibit Fees or Cap Fees at Nominal Amounts for Accessing Reassigned Number Information**

Our retail members believe there should be no cost associated with accessing a list of reassigned numbers or, if there is a cost, it should be capped at a minimal amount. For example, a nominal, annual fee assessed by the Commission for access to an FCC-established database that helps cover the actual transactional cost of a search may be acceptable. However, the reporting requirement should not be a profit-making venture for service providers or data

aggregators that may seek to establish new revenue streams for maintaining or providing access to a database with accurate information about phone number reassignments.

The FCC should also not profit from its role in establishing a central resource that helps businesses comply with the TCPA. Rather, the FCC should do everything it can to prohibit or limit database access fees that could be used for price-gouging callers, including many small businesses.

Although the retail industry contributes \$2.6 trillion to our national GDP, 98% of all retailers have less than 100 employees. For this reason, NRF strongly urges the Commission to ensure that costs for accessing information necessary to comply with the law are prohibited or kept at a nominal amount. The reporting mechanism rules the Commission ultimately establishes should not further a money-making opportunity for larger entities that seek to prey on the vast majority of America's private sector employers – small businesses.

**6. Eligibility to Access Reassigned Number Data: Access to an FCC-Established Database Should Be Limited to Those Meeting Reasonable Eligibility Standards**

Retailers would support a reasonable certification requirement placed on callers that the information accessed in an FCC-established centralized database of reassigned number information would be used only for purposes of TCPA compliance and not for other commercial purposes. A certification requirement might, for instance, eliminate database access and usage only for marketing purposes unrelated to verifying assigned numbers for calling or texting customers who have provided consent.

Similar in nature to establishing mechanisms to track access to a centralized database, reasonable eligibility requirements for access may effectively deter bad actors who would otherwise access the database for impermissible purposes. For example, to deter bad actors who might misuse phone numbers, those who access the database could be required to register and to

certify the purpose for which the database is being accessed (a process not unlike the permissible purpose certifications associated with access to credit reporting information under the Fair Credit Reporting Act). Access could then be limited to those who (1) meet the FCC’s eligibility standards, and (2) have a “permissible purpose” for accessing the database.

The Commission asked in its NOI last year if callers accessing the reassigned number information should first be required to “obtain from the Commission a certificate or other authorization by which they (1) agree that information will be used only for purposes of TCPA compliance, and not for other commercial purposes, and (2) acknowledge that any unlawful use of the information shall subject them to enforcement, including forfeitures.” Some of our members may support such a requirement, but NRF cannot take a position on this question now without having an opportunity to review proposed regulatory language and comment on it based on our members’ review and input on the text. We therefore reserve the right to revisit this question in a later filing and provide future comments based on proposed text offered by the Commission.

**7. Providers to be Covered: All Voice Service Providers Should Be Required to Report Reassigned Number Information**

Because the TCPA prohibits prerecorded and artificial voice marketing calls to landlines, the reporting requirement should apply to all VSPs, not just wireless providers as the NOI inquires. All service providers, including interconnected Voice-over-IP (VoIP) providers who do not obtain numbers directly from the numbering administrators, should be required to report reassigned numbers by law. Mobile virtual network operations should be treated the same as facilities-based providers. Consumers likely do not know nor appreciate any differences among mobile virtual networks, VoIP providers and other VSPs; the requirement for all service providers to report reassigned number information for their customers should be the same.

### **C. Additional Area of Concern over TCPA for Commission's Consideration**

Retail stores also continue to face lawsuits under the “any means” test for a customer’s revocation of consent for being contacted at a customer-provided telephone number, even where a plaintiff appears to have purposefully avoided using a known and easy-to-use mechanism provided by a store to halt further text communications (e.g., where text messages instruct recipients to text back “STOP” to cease communications and customers’ return texts artfully avoid using it or similarly recognized words in order to assert a claim under an “any means” standard for revoking consent).

NRF would appreciate the FCC reviewing this additional area of ambiguity in the law that may give rise to unwarranted lawsuits, particularly in light of the recent D.C. Circuit decision. The Commission could help reduce excessive litigation by updating its rules to provide greater clarity and guidance to businesses as to what constitutes a reasonable revocation request as part of the Commission’s ongoing efforts to ensure the TCPA remains an effective consumer protection law in this era of advanced customer communications.

### **D. Conclusion**

NRF urges the FCC to move swiftly to establish a centralized database for reassigned numbers that serves as a comprehensive, single source of truth regarding number reassignments for businesses wishing to contact their customers at phone numbers for which they have already obtained consent. As exemplified by the comments provided above, the Commission is in a unique position to resolve this significant and longstanding problem of reassigned numbers that should be addressed as soon as possible for both consumers and businesses alike.

Meeting the TCPA’s requirement for express prior consent necessarily includes a process where callers can check to see if customers who provided consent (and reasonably expect to be



contacted by phone or text message) have had their numbers reassigned. Businesses that wish to call customers should not be forced to engage in a “wild goose chase” to identify the specific VSP for each customer number for which they have consent, or to contract with all possible VSPs to receive comprehensive reassigned number information. Only a centralized database established by the FCC would provide the benefits that consumers have long sought and NRF and its member companies have repeatedly called upon the Commission and courts to facilitate by interpreting and enforcing the TCPA in a manner that balances the interests of consumers and businesses alike while not needlessly burdening the reasonable expectations of the parties.

Finally, NRF respectfully suggests that the Commission continue to review its existing TCPA rules and consider addressing other areas of known legal dispute where clarification of the rules or updates to them that address advanced communications would be beneficial to both consumers and businesses.

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We appreciate the Commission’s consideration of our views on this petition. Please do not hesitate to contact Paul Martino, NRF’s Vice President, Senior Policy Counsel, at [martinop@nrf.com](mailto:martinop@nrf.com) if we can provide further information to you on this matter.

Respectfully submitted,  
National Retail Federation  
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